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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE, LIBERTY MUTUAL INSURANCE COMPANY

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BRIEF OF AMICUS CURIAE, LIBERTY MUTUAL INSURANCE COMPANY

STATEMENT OF INTEREST OF AMICUS CURIAE

Liberty Mutual Insurance Company, *Amicus Curiae,* files this brief in support of the Petitioner pursuant to the written consent of the attorneys for the respective parties, dated September 22, 1978, and filed herein. Although this *amicus* was the workmen's compensation insurance carrier of the employer, neither it nor the employer desire to be, have been, or are parties to this action, it having been the consistent position of this *amicus* that under Section 5(b) of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") (33 U.S.C. § 905(b)) neither it nor

the employer can be forced to become parties. However, since in the Court below Respondent shipowner and *amicus* shipowner's group advanced arguments which, if accepted, could adversely affect the rights of this *amicus* and others similarly situated, this *amicus* feels compelled to use this means of explaining its views to this Court.

QUESTION PRESENTED

Does Section 5(b) of the LHWCA as amended in 1972 permit a reduction in a vessel owner's liability to an injured longshoreman where negligence of the vessel owner and of the stevedore company employer concur to cause the injury?

As applied to the facts of this case, the precise question presented is whether the longshoreman (Petitioner here) is entitled to recover from the vessel owner (Respondent) $20,000 or $90,000.

As of December 18, 1978, this *amicus* had paid out to or for the account of Petitioner statutory benefits in the total amount of $49,152.23. Payment of workmen's compensation continues at the rate of $184.07 per week. On the basis of established law, e.g., *The Etna,* 138 F.2d 37 (3 Cir. 1943); *Albert v. Paulo,* 552 F.2d 1139 (5 Cir. 1977), this *amicus* would be entitled to a lien upon Petitioner's recovery to the extent of the amount of benefits paid; but manifestly this cannot be effected here if the recovery is only $20,000. As the Court below noted (A60-61),[1] it could not pass upon the distribution of the fund because the employer was not (and could not be made) a party to the case.

It follows that this Court does not have before it the direct question of whether the employer/carrier must take a deduction from the lien or reimbursement on

[1] References are to the opinion below as it appears in the Appendix to the Petition for Writ of Certiorari.

account of the employer's negligence, a theory which shipowner's counsel, using the full power of suggestion, choose to call the "equitable credit".[2] That question is presented in an interpleader action brought by Respondent shipowner in the United States District Court for the Eastern District of Virginia, entitled *Compagnie Generale Transatlantique v. Stanley Edmonds, Liberty Mutual Insurance Company, and Nacirema Operating Co., Inc.,* Civil Action No. 78-413-N. This "credit", equitable or otherwise, is not before this Court except to the extent that it depends for its existence upon the proposition that the 1972 Amendments abrogated the long-established rule of maritime and common law known as the "joint and several liability" of each tortfeasor. In the instant case the question, more precisely, is one of "several" liability for, since the employer has a statutory immunity from tort liability to the employee, he is not a "tortfeasor" nor is his liability "joint". *American Mutual Insurance Co. v. Matthews,* 182 F.2d 332 (2 Cir. 1950); *Atlantic Coastline R.R. Co. v. Erie Lackawanna R.R. Co.,* 406 U.S. 340 (1972); *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.,* 417 U.S. 106, 115 (1974). As indicated above, the only question here is whether the Respondent is subject to such several liability. It is the position of this *amicus* that Respondent is so subject.

[2] See, e.g., Coleman and Daly, Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation under the 1972 Amendments to the Longshoreman's and Harborworkers' Act, 35 Md. L.R. 351 (1976). This article is a strong brief for the credit, long on "equitable" arguments and short on fundamental law. However, it distorts the legislative history of the Amendments (thereby contributing to the erroneous conclusion that Congress in 1972 intended to adopt by statute the proportionate fault rule promulgated by this Court for collision cases in 1975 in *United States v. Reliable Transfer Company, Inc.,* 421 U.S. 397). It almost totally disregards the basic legal question presented in the instant case as to whether the Amendments, with or without an enactment of proportionate fault, abrogated the rule of joint and several liability which is deeply embedded in both maritime and common law.

SUMMARY OF ARGUMENT

The 1972 Amendments to the LHWCA reconfirm the rule, well-established by decisions of this Court and statutory enactments, that in maritime personal injury cases the common law defense of contributory negligence gives way to a rule of comparative negligence whereby the Plaintiff's recovery is reduced in proportion to his own negligence. The Amendments do not, however, provide for the apportionment of fault between a negligent third party (whether vessel owner or otherwise) and a negligent employer covered by the LHWCA. Furthermore, the Amendments do not abrogate the well-established rule of maritime and common law that an injured person may recover his full damages from any *one* of multiple wrongdoers. The contrary position taken by the Court below is not supported by the statutory language itself or by the legislative history. This Court's decision in *United States v. Reliable Transfer, Inc.*, 421 U.S. 397 (1975), decided three years after the Amendments, has no relevance to their interpretation.

The Amendments have imposed an onerous financial burden upon employers while at the same time providing shipowners with new and effective defenses to suits by employees. Congress could not have intended further to unbalance the scales in favor of shipowners by relieving them of any portion of their traditional liability for the full results of their negligence while at the same time further burdening employers by reducing their potential lien recoveries. In any event, Congress has, for over a year, had under active study the functioning and impact of the 1972 Amendments and can be expected further to amend the language of Section 5(b) if it should find that the courts have thwarted its intent, as Respondent shipowner claims has been done by the Second, Fifth and Ninth Circuits and by several other district courts which have

ruled against shipowners. Petitioner and his supporting *amici*, on the other hand, contend that the Court below effectively rewrote the relevant statutory provisions.

ARGUMENT

I.

UNDER THE FIRMLY ESTABLISHED RULE OF BOTH MARITIME AND COMMON LAW, EACH TORTFEASOR IS SEVERALLY LIABLE FOR ALL DAMAGES RECOVERABLE BY THE INJURED PERSON.

No authority need be cited for the common law rule of several liability; even the Court below recognizes the viability of the doctrine (A56-57). Although it does not expressly so state, the Court's language strongly implies that it fails to understand that this is and always has been the rule of admiralty law as well. At three points in one paragraph and appended footnote, the Court refers to this as a "common law doctrine" or "common law principle" and even more pointedly refers to it (fn.2) as one of "the principles of land-based negligence law." Since the instant case involves an injury on navigable waters, it is governed by the substantive principles of maritime law, and the same rule applies both afloat and ashore. Had not the Court below indicated ignorance of this fact, it might have been sufficient for us merely to pass the point with references to two decisions of this Court which document our statement. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *Cooper Stevedoring Company, Inc., v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). In *Halcyon* a shipowner found 25% at fault was required to pay 100% of the longshoreman's damages. In *Cooper* this Court stated that the injured longshoreman could have recovered his full damages from either the shipowner or from another joint tortfeasor though each was found to have been 50% at fault.

These decisions are merely the latest in a long line extending back for more than 100 years. The question has arisen most frequently in cases of marine collision. In *The Washington and The Gregory,* 76 U.S. (9 Wall.) 513 (1870), suit was brought by a passenger injured in a collision against both the carrying vessel and the non-carrying vessel. *This Court held that he could recover his full damages from either.*[3] The same result has been reached in numerous cases of property damage resulting from collision. *The Alabama and The Gamecock,* 92 U.S. 695 (1876) (suit by innocent tow against its tug and other vessel colliding with tow); *Phoenix Ins. Co. v. The Atlas,* 93 U.S. 302 (1876) (suit by cargo on an innocent vessel against two other vessels each at fault); *The Chattahoochee,* 173 U.S. 540 (1899) (suit by cargo against non-carrying vessel for physical damage caused in collision with carrying vessel which was immune from direct suit); *Aktieselskabet Cuzco v. The Sucarseco,* 294 U.S. 394 (1935) (suit by owner of cargo against non-carrying vessel to recover for general average contributions paid to carrying vessel which was immune from direct suit).

Those being collision cases, contribution was of course allowed between the joint tortfeasors (each sharing equally). The important point is that as of 1972 not only was there joint and several liability, but there was stated to be no contribution at all except in collision cases. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra.* Indeed this was confirmed two years later for personal injury cases like this, i.e. those subject to the LHWCA, although the over-broad dictum in *Halcyon* was narrowed to the facts of the case. *Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra.* And

[3] Under English maritime law also the rule of joint and several liability in personal injury cases has been applied as at common law. See *The Bernina,* [1887] 12 P. 58 (C.A.), *aff'd* [1888] 13 App. Cas. 1 (H.L.).

the rule of proportionate contribution did not come until three years after the Amendments. *United States v. Reliable Transfer Co., Inc., supra.*

Beyond doubt, then, the rule of full liability for joint negligence has always been deeply imbedded in the law. The Court below, at the urging of the shipowners, has held that Congress by the 1972 Amendments abrogated this rule as to them. No contention can be made, however, that the statute contains clear language to that effect; and the Court noted that: "There is nothing explicitly enlightening in the legislative history." (A57, fn.2.) This situation squarely invokes the maxim that statutes in derogation of the common law must be strictly construed. This is particularly true where, as here, the construction contended for by Respondent would grant it a limitation of liability not heretofore recognized. *Robert C. Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297, 302-305 (1959).

As strictly construed, or indeed as liberally construed, the language of this statute does not support the radical new interpretation urged here. Consequently, Respondent's whole case collapses. It is not entitled to a "credit" of any kind, either against Petitioner's recovery, or against the insurance carrier's reimbursement for compensation benefits paid. Petitioner should have judgment for $90,000, and the District Court can then decide in the interpleader case what lien rights this *amicus* has.

II.

THIS COURT'S DECISION IN *UNITED STATES V. RELIABLE TRANSFER CO., INC.,* 421 U.S. 397 (1975), HAS NO RELEVANCE WHATEVER TO THE INSTANT CASE.

The Court below accepted the argument of Respondent and of *amici* shipowners that this Court's decision in *Reliable* establishing a rule of proportionate fault dictates that Respondent should be liable only for its

percentage of the total fault which contributed to Petitioner's injury. Injecting *Reliable* into an analysis of Section 5(b) of the 1972 Amendments involves a series of *non-sequiturs;*

1. It does not follow from a decision of this Court in 1975 that Congress would in 1972 have been influenced thereby.

2. It does not follow from the establishment by this Court of a proportionate fault regime in cases of property damage from collision or stranding (421 U.S. at 411) that Congress would have adopted such a rule in cases of personal injury covered by the workmen's compensation statute.

3. It does not follow from the establishment of a proportionate fault rule for the non-statutory general maritime law that this Court should impute the same intent to Congress in enacting legislation which purports to cover its field.

4. Even if Congress had intended to provide for proportionate fault as between shipowner and employer, it does not follow that it intended to abolish the doctrine of joint and several liability to third parties.

The shipowners pressed the Court below to apply to this case the decision in *Reliable Transfer.* We submit that their argument, which will presumably be repeated here, turns legal history upside down. Let us commence by laying out the precise holding in *Reliable:* in a collision or stranding where the two vessels (or a vessel and a shore station) are both at fault, their rights *inter sese* to recover for property damage are based upon proportionate fault rather than upon equal division. The case had nothing whatsoever to do with the liability of either to a third party, for either property damage or personal injury.

Since manifestly a 1975 decision could not have been written into a 1972 statute,[4] the Court below had to

[4] A statute must be construed in the light of events contemporaneous with, and not subsequent to, its enactment.

resort to the suggestion that in 1972 there was a "trend" to expand the doctrines of comparative negligence, citing *Reliable* (A58). Of course, state legislatures and Supreme Courts have been increasingly adopting rules abolishing contributory negligence as a complete defense and substituting a percentage reduction of recovery. See V. Schwartz, *Comparative Negligence* (1974) 1-29. Sometimes, but not always, provision is also made for contribution among joint tortfeasors; and sometimes, but not always, this is on a percentage basis. Whatever the "trend" may have been in automobile law, it was not reflected in American maritime law, at least before 1975, except of course that traditionally the plaintiff's contributory negligence in a case of personal injury or death merely reduced his recovery percentagewise. *The Max Morris,* 137 U.S. 1 (1890).

Because of the international nature of maritime law, it is significant that in England and continental countries there had indeed been a strong trend toward percentage apportionment of fault in all maritime cases, commencing in France in the 1870's and gaining its greatest momentum with the Brussels Collision Convention of 1910. See Owen, *The Origins and Development of Marine Collision Law,* 51 Tul. L.R. 759, 792-798 (1977). This marked difference between developments here and abroad prior to *Reliable Transfer* was the theme of numerous law review articles in which the authors decried the *absence* of any trend toward apportionment (except, of course, as between plaintiff and defendant in personal injury and death cases). See Huger, *The Proportional Damage Rule in Collisions at Sea,* 13 Cornell L.Q. 531 (1928); Sprague, *Divided Damages,* 6 N.Y.U.L. Rev. 15 (1929); Mole and Wilson, *A Study of Comparative Negligence,* 17 Cornell L.Q. 333 (1932); Staring, *Contribution and Division of*

See *United States v. Wise,* 370 U.S. 405, 411 (1962); *Fogarty v. United States,* 340 U.S. 8, 13 (1950).

Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304 (1957); Allbritton, *Division of Damages in Admiralty — A Rising Tide of Confusion,* 2 J. Mar. L. & Com. 323 (1971).

The writings of the two recognized admiralty scholars Staring and Allbritton are particularly notable because they wrote after *Halcyon* and before the 1972 Amendments. Staring referred (p. 340) to the absence of a proportional damage rule in collision cases as "the great anomaly of the maritime law applied in America today." Allbritton noted (p. 338) that "the courts have refused to adopt a theory that would assign percentages of fault among multiple defendants." As late as 1973 it was still being debated whether there was *any* right to contribution in non-collision cases; and there was no suggestion that, if so, it was on a percentage basis. See Allbritton, *Contribution Among Joint Tortfeasors in Non-Collision Maritime Cases,* 4 J. Mar. L. & Com. 425 (1973).

Reliable Transfer, of course, changed all of that in collision cases. Evidence was not long in coming thereafter that percentage apportionment among multiple defendants in non-collision personal injury cases might follow *Reliable.* See, e.g., *Griffith v. Wheeling Pittsburgh Steel Corporation,* 521 F.2d 31, 44, *cert. den.* 423 U.S. 1054 (1976). Before *Reliable,* however, there was no such "trend" in the maritime law. For these reasons, we submit, attempts to impute to the 1972 Congress an intent to adopt a rule of proportionate contribution are totally without justification.[5]

There is another more subtle reason why *Reliable Transfer* does not help the shipowners here. It stems

[5] As late as 1974, this Court specifically refrained from determining whether contribution among multiple defendants in such personal injury cases should be on an equal basis or on a percentage basis. See *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.,* 417 U.S. 106, 108, fn. 3.

from the language of the Brussels Collision Convention of 1910, the relevant provisions of which are as follows:

> "Art. 4. If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.
>
> The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties.
>
> In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties, without prejudice to the right of recourse of the vessel which has paid a larger part than that which in accordance with the provisions of the first paragraph of this article she ought ultimately to bear." 6 *Benedict on Admiralty* (7th ed. 1969) 39.

This Court in *Reliable Transfer* quoted from Article 4 of the Convention (421 U.S. at 403) and ultimately (id. at 411) stated its holding in language virtually identical with that of the Convention. The same Article contains a provision for personal injury and death claims and specifically preserves the rule of joint and several liability, subject, of course, to the right of contribution proportionate to fault. See Brandon, *Apportionment of Liability in British Courts under the Maritime Conventions Act of 1911,* 51 Tul. L. Rev. 1025, 1028 (1977).

The point is that a rule of joint and several liability is perfectly compatible with a rule of proportionate fault. Thus, even if Congress had spelled out in the 1972 Amendments a proportionate fault rule, shipowners would have remained severally liable to employees *unless the statute had also expressly abolished several*

liability, which of course it did not do. This has been the result in every case in which the question has been presented. Schwartz, *Comparative Negligence* (1974) at 253; *American Motorcycle Ass'n v. Superior Court,* 20 Cal. 3d 587, 146 Cal. Rptr. 182, 578 P.2d 899, an *en banc* decision of the Supreme Court of California in 1978. Coming from the court which is widely known for its advancement of new tort theories, this decision is sufficiently illustrative for our purposes and merits full quotation (20 Cal. 3d 586-590, 146 Cal. Rptr. 187-190, 578 P.2d 904-907):

> "Under well-established common law principles, a negligent tortfeasor is generally liable for all damage of which his negligence is a proximate cause; stated another way, in order to recover damages sustained as a result of an indivisible injury, a plaintiff is not required to prove that a tortfeasor's conduct was *the sole* proximate cause of the injury, but only that such negligence was a proximate cause.
>
> * * * *
>
> In the concurrent tortfeasor context, however, the 'joint and several liability' label does not express the imposition of any form of vicarious liability, but instead simply embodies the general common law principle, noted above, that a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused.

> * * * *
>
> As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm. In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.
>
> * * * *
>
> Indeed, although [co-defendant] fervently asserts that the joint and several liability concept is totally incompatible with a comparative negligence regime, the simple truth is that the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine. As Professor Schwartz notes in his treatise on comparative negligence: 'The concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question.' [citation omitted]. [*Co-defendant*] *has not cited a single judicial authority to support its contention that the advent of comparative negligence rationally compels the demise of the joint and several liability rule. Under the circumstances, we hold that after Li* [the California case establish-

ing comparative negligence], *a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.'*" (Italics supplied)

The post-*Reliable* personal injury and death cases have continued to apply the rule of joint and several liability while apportioning fault among defendants. *Hogge v. SS Yorkmar,* 434 F. Supp. 715, 728 (D. Md. 1977);[6] *Linehan v. United States Lines, Inc.,* 417 F. Supp. 678, 694-695 (D. Dela. 1976), *mod.* 559 F.2d 1208 (3 Cir. 1977); *Fathom Expeditions, Inc. v. M/T Gavrion,* 402 F. Supp. 390, 393-394 (M. D. Fla. 1975); Vickery, *Special Problems of Personal Injury or Death Arising Out of Collision Disaster Cases,* 51 Tul. L. Rev. 896, 932-935 (1977).

Reverting now to *Reliable* and the Collision Convention, we draw the Court's attention to the second paragraph of Article 4 which provides for damage to cargo and other property. In this instance the joint and several liability rule is expressly abrogated, thus expressing in eight clear words what the shipowners here contend that Congress *implied* in the 1972 Amendments. Thus the Convention satisfied Professor Schwartz's criterion that the concept of joint and several liability is retained under a proportionate fault regime "unless the statute specifically abolishes it". *Comparative Negligence* at 253. The ultimate proof of the continued, complete viability of the joint and several liability rule in American maritime law appears in the post-*Reliable* decisions to the effect that this

[6] *Hogge* is particularly in point because there one of the defendants was permitted to limit its liability, thus presenting a situation analogous to statutory immunity (as in the instant case), bankruptcy, inability to effect service of process, etc., all of which bring the joint and several liability rule into sharp focus.

Court did not adopt this section of the Convention, did not overrule the *Chattahoochee, supra,* and did not abrogate the joint and several liability rule even in cases of damage to innocent cargo. See Kasanin, *Cargo Rights and Responsibilities in Collision Cases,* 51 Tul. L.R. 880, 888 fn.63 (1977); Owen, *supra,* n.3, at 797-798, 804-806; and cases cited in said articles plus *Complaint of Flota Mercante Grancolombiana, S.A.,* 440 F. Supp. 704, 724-725 (S.D.N.Y. 1977).

III.

THE LEGISLATIVE HISTORY DOES NOT SUPPORT RESPONDENT'S INTERPRETATION OF THE STATUTE.

1. *The Committee Hearings*

During May and June, 1972, the Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate (92d Cong. 2d Sess.) held hearings on S. 2318, S. 525, and S. 1547 (843 pages) (hereinafter cited as *Senate Hearings*). Thereafter, in June and July, 1972, the Select Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives (92d Cong. 2d Sess.), held hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (332 pages) (hereinafter cited as *House Hearings*). From these hearings emerged the 1972 Amendments. Consequently, it is essential to search this public record for any evidence of the now alleged Congressional intent to limit the liability of shipowners, in suits by covered employees, to the shipowners' percentage of the total fault contributing to the injuries.

Not even shipowners now contend that the hearings provide any direct evidence to support their position. This is perhaps not surprising in view of the fact that shipowners took no part in the hearings. A great many witnesses testified and/or submitted written statements, the total of which comprises 1,175 pages. These

were Senators and Congressmen, representatives of the Department of Labor, representatives of labor unions, representatives of bar associations of plaintiffs' attorneys, employers of all types of waterfront labor and their associations and committees, and insurance carriers of such employers. Conspicuous by their absence were representatives of shipowners, shipowner associations, and shipowners' insurance underwriters. In view of the subsequent controversy raised by shipowners as to the impact of the Amendments upon their rights and defenses (as exemplified by this case), it would seem logical to find in the hearing record some proposal by shipowners of the positions which they now espouse. This would have added some credibility to their present contentions as to the intent of the two Committees. Conversely, their failure to participate in the legislative process, while in no way subject to criticism, does make it impossible for Respondent and its supporting *amici* to track their contentions back to the legislature.

In this connection, there is relevance in the remark of the lower court: "Before 1972 the exposure of ships to liabilities for injuries to longshoremen was comparatively slight except insofar as reparations for such injuries occasioned higher stevedoring costs." (A52). Unquestionably the exposure of employers was "comparatively" much greater than that of shipowners. But, if the latter's exposure was only "slight", there can be no presumed intent on the part of Congress to legislate a radical new defense in favor of shipowners. Rather, the logical inference from this is that Congress intended to protect employers by fortifying their rights and defenses as set forth in the then-existing statute. Thus, the quoted statement of the Court below is inconsistent with its own conclusion and actually supports the position taken in this brief.

The key to the whole situation was the overruling of *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and the statutory restoration of the employer's "exclusive liability" under Section 5 of the Act. If the employer could be relieved of the *Ryan* burden, he could agree to higher benefits. (Benefits had not been increased since 1961 because employers could not afford the double exposure.) Given higher benefits, employees could relinquish their rights to recover from shipowners for unseaworthiness awarded them in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946). The hearings were devoid of any sentiment for improving the shipowners' position as such (or for weakening it either) — only for abolishing their liability to harbor workers for unseaworthiness, which would in turn make it feasible to overrule *Ryan,* which would in turn break the impasse between employers and employees.

The record is replete with examples of such testimony, of which that of the lead-off witness, Secretary of Labor Hodgson, is typical. *Senate Hearings* 28-31. The AFL-CIO representative referred to "circular liability" as being "the big problem at this point". *House Hearings* 284. A leading representative of stevedores called it "the most serious problem in the longshore industry" which "commands paramount consideration before any decision can be reached regarding improvement in the benefits of the Longshore Act". *Senate Hearings* 277. A representative of an *ad hoc* committee of all the major port associations of the United States said that "the longshore compensation system is in crisis, a crisis that is steadily worsening. This crisis is caused by the proliferation of 'third party' or 'circular liability' law suits". *Senate Hearings* 724. A representative of west coast stevedores said: "The steadily increasing incidence of third party suits is, to my mind, at least, the most alarming and threatening problem facing our industry." *Senate Hearings* 632.

Thus, the current argument for improving the position of the shipowner *at the expense of the employer* is diametrically opposite to the purpose and intent of Congress. The Committees were thoroughly aware of such rights and defenses as employers then retained under the existing law. First, they knew that the shipowner could not get contribution from the employer on any basis, percentage, equal, or otherwise, because this Court had said so in *Halcyon* (specifically cited by a witness representing plaintiffs' trial lawyers, *House Hearings* 152). Secondly, they knew that the employer was entitled to a lien on the employees' recovery to the extent of *all* statutory benefits theretofore paid. *Senate Hearings* 30 (Secretary Hodgson), 354; *House Hearings* 48 (Secretary Hodgson), 119, 135, 158. They also knew that a reduction of the employers' lien would be "the substantial equivalent of contribution" because this Court had said so. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 412 (1953). This Court had also made this clear in *Halcyon* when it reversed the decision of the Court of Appeals granting the shipowner "an equitable adjustment" against the lien. *Baccile v. Halcyon Lines,* 187 F.2d 403, 405 (3 Cir. 1951).

The hearing record demonstrates that the objective was not, as Respondent here argues, to give the negligent shipowner a new defense to the employees' claim to damages and to the employers' claim to a lien, when the employer was also negligent. The objective was to guarantee such rights and defenses as the employer then had under the statute and under *Halcyon* and *Pope & Talbot.* In particular, the need was to protect the employer from the "end around play" of *Ryan.*[7] This culminated in the new protective language of Section 5(b) which insured that the shipowner would

[7] See, e.g., *Senate Hearings* 28-31, 174, 190, 209, 258-292, 621-625, 626-631, 632-639, 640-642, 657, 661, 722-748, 785-786, 791-792. *House Hearings* 47-50, 71, 81-86, 91-93, 243.

have no right of indemnity or contribution "directly or indirectly" and that the employers' right of full lien reimbursement would be guaranteed. This would fully implement *Halcyon* and *Pope & Talbot,* would eradicate the *Ryan* doctrine, would solve the problem of circular liability, and would clear the way for an increase in benefits to the employees.

Various suggestions were made with respect to third party suits against shipowners. At one extreme, the Administration, through Secretary Hodgson, proposed abolishing them entirely, whether based upon unseaworthiness or negligence (*Senate Hearings* 38; *House Hearings* 50), as did a prominent representative of stevedores. *Senate Hearings* 273, *House Hearings* 117-118. At the opposite extreme representatives of plaintiffs' lawyers advocated leaving them intact as under *Sieracki. Senate Hearings* 354, 370-372; *House Hearings* 136. A representative of the shipyard industry, Ralph K. Hartman, advocated the middle ground of abolishing suits for unseaworthiness but preserving to employees the right to recover for negligence. *Senate Hearings* 174-175, 188-191, 206-210; *House Hearings* 71-72, 78-79. This was accepted enthusiastically by both Committees (*Senate Hearings* 174-176; *House Hearings* 72, 79) and ultimately became the new Section 5(b).

This raises the key question of whether in the course of these 1,175 pages of testimony there was any discussion of how to handle the situation where both shipowner and employer were negligent. The logical place to commence this search is in Mr. Hartman's testimony. In fact, he made no reference whatsoever to apportioned fault or damages, as is evident from a full quotation of the relevant portion of his testimony (*House Hearings* 71):

> "I will not summarize the rights of injured seamen, longshoremen, and ship repair yard workers except to say there is a logical basis for the

granting of immunity to a shipowner subjected to a liability due to an unseaworthy condition solely created by a stevedore or ship repair yard contractor. In these cases, the circuity of action arises with the result that the stevedore and ship repair yard contractor have a dual liability.

Clearly this is a situation that is contrary to the original intent of the exclusive remedy provisions of the Longshoremen's Act, and, because of the greatly added burden it places upon stevedores and ship repair yard contractors, should be corrected.

On the other hand, there do not appear to be any compelling reasons to eliminate the rights and remedies of longshoremen and ship repair yard workers when injured as a result of the negligence of shipowners.

To abrogate this right, without the longshoremen or ship repair yard workers receiving a quid pro quo from the responsible third party, would, I suggest, be morally wrong and may raise a question of possible violation of the due process clause of the Constitution.

The reestablishment of the exclusive remedy provision of the act can, with due regard for our employees, be accomplished by removing the warranty of seaworthiness as a basis for determining the liability of ships and shipowners (other than in claims by crewmembers), as was proposed in H.R. 207 in 1961, a copy of which is attached hereto.

The provisions in that bill had the effect of retaining all the injured workers' traditional remedies except for the seaworthiness warranty as applied to longshoremen and ship repair yard workers (in itself a remedy which had not existed prior to 1946), and removing, for practical purposes, the dual liability of stevedores and ship repair yard contractors.

It is suggested that the intended and sorely needed relief can be accomplished by an amendment conforming to H.R. 207."

This statement also appears at *House Hearings* 78-79 and *Senate Hearings* 174, 190-191, 209-210. It is manifest from Mr. Hartman's use of the words "solely created by a stevedore", appearing five times in the record, that he was suggesting the elimination of the *vicarious* liability of shipowners for the acts or omissions of employers. The converse seems equally clear, namely, that he would retain the *full* liability of shipowners for their *own* acts or omissions, as prescribed by established case law, notably *Halcyon*. The "quid pro quo" to which he referred was the preservation of the negligence cause of action in consideration for the elimination of vicarious liability.

Only one witness raised the question of apportionment as between shipowner and employer, this being Mr. David B. Kaplan, representing the American Trial Lawyers Association, whose members represent plaintiffs in personal injury suits. *Senate Hearings* 354-355, 373, 377; *House Hearings* 136-137, 148. Mr. Kaplan's suggestion was, however, made in a context entirely different from that now existing. His proposal was to retain *Sieracki* and the shipowner's absolute liability for unseaworthiness, *including* his vicarious absolute liability for the acts of the stevedore. He would then have allowed the shipowner to get contribution from the stevedore to the extent of the latter's negligence. In effect, Mr. Kaplan would have retained *Sieracki* and overruled both *Ryan* and *Halcyon*.

The Kaplan suggestion was given short shrift in both Committees and never reappeared in the hearings or in the Committee reports. Senator Eagleton, conducting the Senate hearings, dismissed the suggestion as being contrary to the whole "concept of workmen's compensation". *Senate Hearings* 355. In the House Committee the Kaplan suggestion was, paradoxically, criticized by another representative of the plaintiffs' bar because it "alters the compensation scheme and that really what

the stevedore was promised under the Longshoremen's and Harbor Workers' Act was exclusive liability for damages to one of its own employees." *House Hearings* 152. That was the last heard of apportionment in any form between shipowners and employers.

2. *The Committee Reports*

The Senate and House Committees produced Reports which are identical in most respects. The Senate Report is No. 92-1125, reprinted in relevant part as an appendix to Petitioner's brief. The House Report is No. 92-1441, reprinted in 6 U.S. Code Cong. & Ad. News, 92d Cong. 2d Sess., at 4698. This Court has demonstrated the usefulness of these Reports. *Northeast Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977).

The Respondent and its supporting *amici* read the Reports as providing for apportionment of fault between shipowner and employer. Two general comments can be made in reply. First, it is inconceivable that the Committees would be thus recommending legislation which radically altered existing law without any discussion thereof in the lengthy hearings (except only for the Kaplan testimony discussed *supra*). Secondly, Respondent's interpretation is made possible only by taking various statements of the Committees completely out of context.

For example, Respondent argues that the Committees specifically adopted "comparative negligence". While the Reports do use the phrase (*Senate Report* 12), it is perfectly obvious that what is meant is the comparative negligence of plaintiff and defendant shipowner. In fact, the remainder of the same sentence so states. The context is not one in which the relationship of shipowner and employer is at issue.[8] The "admiralty

[8] The phrase "comparative negligence" properly refers to a comparison of fault between plaintiff and defendant, not between co-defendants or others. V. Schwartz, *Comparative Negligence* (1974); Prosser, *Comparative Negligence,* 51 Mich. L. Rev. 465 fn.2 (1953).

concept of comparative negligence" referred to was that represented by *The Max Morris, supra,* which was in 1972 the only form of comparative negligence known to the American admiralty.

Other statements in the Reports are lifted out of context, notably this one: "The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore". *Senate Report* 11. If the Committees had been speaking in terms of percentage apportionment, they could easily have said so. Even the simple phrase "to the extent that the stevedore is negligent" would have done it. On the contrary *what they were talking about was the vicarious liability of the shipowner for the acts of the stevedore in causing the unseaworthy condition or bringing it into play.* In fact, the Reports expressly so state. *Senate Report* 9. This is entirely consistent with the testimony at the hearings referred to, *supra,* particularly that of Mr. Hartman, which developed the concept that the shipowner should remain liable for his own acts or omissions as at common law but should not be liable vicariously for those of the stevedore.

The Reports make this perfectly clear by citing a long list of cases in this and the lower courts in which shipowners were held "liable in damages for acts or omissions of stevedores" in causing or bringing into play a condition of unseaworthiness. *Senate Report* 10. Two of them are worthy of special mention. In one the unseaworthy condition was caused by the shipowner's negligence and brought into play by the stevedore's negligence. *Crumady v. The J. H. Fisser,* 358 U.S. 423 (1959). Had the Committees been disposed to apportion fault, this would have been a perfect example. In

another case cited the shipowner was held liable for unseaworthiness resulting from a *non-negligent* act of the stevedore. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). There was no room for apportionment there; in fact it represented the ultimate in vicarious liability. The Committees proposed simply overruling all of these cases, suggesting no middle ground such as apportionment of fault.

Our conclusion is supported by the repeated references to making shipowners liable "just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." *Senate Report* 8, 10, 11. (This language can be traced back directly to Senator Javits and the Minority Labor Counsel, who likened the situation to one on a building construction site. *Senate Hearings* 38, 175-176, 272-274, 656.) The use of land-based law as a measure has two facets. First, it imported a new standard of care into third party stevedore actions. Secondly, it reconfirmed that the common law principle of joint and several liability would apply on a vessel as on a construction site. The dissenting judge below thought this important (A64).

Whether articulated or not, the burden of Respondent's argument is that the 1972 Amendments overruled, not only *Sieracki* and *Ryan*, but also *Halcyon* and *Pope & Talbot*. Fortunately the Committee Reports carry their own refutation of such an argument in that they carefully list the cases which were intended to be overruled, namely *Sieracki (Senate Report* 8), *Ryan* (p. 9), and *Crumady, et al.* (p. 10). Neither *Halcyon* nor *Pope & Talbot* was included in the list, although they had both been cited in the hearings.

IV.

THE STATUTORY LANGUAGE ITSELF DOES NOT SUPPORT RESPONDENT'S INTERPRETATION.

The lower court's misreading of the statute can be pin-pointed in one phrase which it used four times: the shipowner is liable "to the extent" of its negligence (A. 55, 56, 57, 58). Obviously such language as that would call for apportionment, but the fact is that Congress did not use these words. They were injected by the Court for the purpose of expressing its own conclusion and have no probative value.

Respondent cannot point to any language in Section 5(b) which on its face calls for apportionment, and the Court below made no attempt to point out any such direct support for its position. In lieu of such supporting language the Court merely resorted to an exercise in semantics by reasoning that the first and second sentences of Section 5(b) are irreconcilable except in terms of apportioned negligence. We suggest that this is a slender reed upon which to base the Court's decision, and the dissenting judge refused to accept it (A. 64-66). He read the second sentence as stating simply that "the plaintiff may not base his claim against the shipowner upon the negligence of the stevedore." (A. 65). This merely expresses the negation of vicarious liability which we have traced in detail through the hearings and the Reports. See *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 40 (3 Cir. 1975), *cert. den.* 423 U.S. 1054 (1976).

Actually, the short answer to the Court's interpretation is that the second sentence (and third sentence) were included in the statute to cover a situation not involved in the instant case. This is made plain in the paragraph of the Report commencing at the bottom of page 11 and carrying over to the top of page 12. This Court had held in *Reed v. SS Yaka*, 373 U.S. 410 (1963), and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371

(1967), that a longshoreman could sue his employer for unseaworthiness of the vessel where the employer was both shipowner and stevedore. Mr. Justice Harlan, dissenting with Mr. Justice Stewart, thought that this repealed the "exclusive remedy" provision of Section 5 (373 U.S. at 416). On the other hand the decision prevented inequity to a longshoreman who happened to work for a stevedore loading his own vessel. The Committees resolved this dilemma by preserving the right to sue a shipowner-stevedore for the negligence of his employees not engaged in stevedoring as, for example, members of the crew, shore-based personnel, etc.

The second and third sentences, therefore, were intended to narrow the scope of recovery in a *Yaka* situation, while preserving its broad outlines. This has been the result in all but one of the reported cases.[9] In the instant case the shipowner and stevedore are entirely independent, and therefore the *Yaka* problem is not involved.

The lower court does not mention the one provision of Section 5(b) which deals with the present situation. The decision below reduces the plaintiff's recovery from $90,000 to $20,000. Since the insurance carrier (this *amicus*) has a lien on the recovery of $49,152.23 (as of December 18, 1978), the Court's decision reduces the carrier's reimbursement by $29,152.23. In other words the carrier is called upon to *contribute* $29,152.23 to the shipowner who is saving $70,000. It is our position that

[9] *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 40-44 (3 Cir. 1975), *cert. den.* 423 U.S. 1054 (1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2 Cir. 1976); *Smith v. M/V CAPT. FRED*, 546 F.2d 119, 122-123 (5 Cir. 1977); *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (E.D. Va. 1976), *aff'd* 580 F.2d 702 (4 Cir. 1978); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402, 409 (E.D. La. 1975); *Contra: Baker v. Pacific Far East Line, Inc.*, 451 F. Supp. 84 (N.D. Cal. 1978) (holding *Yaka* overruled completely).

this ruling is contrary to the statutory language: "* * * the employer shall not be liable to the vessel for such damages directly or indirectly * * *." Professor Robertson supports this position in his article *Jurisdiction, Shipowner Negligence and Stevedore Immunities Under the 1972 Amendments to the Longshoremen's Act*, 28 Mercer L. Rev. 515, 542 (1977):

> "As indicated above, it ought to be completely clear that, aside from the peculiar situation of the stevedore who is also a shipowner, all forms of tort recovery against stevedores on account of longshoremen's injuries are foreclosed by the 1972 amendments. The prohibition in § 905(b) against any liability of the stevedore to the shipowner 'directly or indirectly' should be fully understood to mean that the negligent shipowner is to bear the full tort liability to the injured longshoreman, subject only to a diminution by plaintiff's negligence, and that there is no way for all or part of that liability to be shifted on account of any negligence of which the stevedore may have been guilty."

Directly in point here is this Court's decision in *Pope & Talbot, supra*, 346 U.S. at 412, which termed a reduction of the lien "the substantial equivalent of contribution". This remains good law.[10]

The LHWCA contains other evidence of Congressional intent not mentioned by the Court below. It has to do with third party actions against others than shipowners. From 1927 to 1972 the statutory basis for all third party actions was Section 33, which was not amended in any relevant respect in 1972. In that year Section 5(b) was added to cover specifically actions

[10] *Lopez v. A/S Svendborg*, 581 F.2d 319, 325-326 (2 Cir. 1978); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725 (2 Cir. 1978); *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 760 (2 Cir. 1975), *cert. den.* 423 U.S. 1053 (1976); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 673 (9 Cir. 1975), *cert. den.* 425 U.S. 944 (1976); see *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 888 (5 Cir. 1978).

against "a vessel," as defined in Section 2(23), but which we have loosely called a "shipowner."

The Court below purports to find in 5(b) a formula for apportionment of fault between employer and shipowner. Yet no one has ever contened that 33 provides for apportionment between employer and *other* types of third party tortfeasor. This is illogical. There is no apparent reason for treating shipowners and non-shipowners any differently. In fact, it would be contrary to the legislative intent to grant to negligent shipowners a limitation of liability to injured employees not granted to non-shipowners.

Congress had the stated "objective of encouraging safety". *Senate Report* 10. Such a grant to a negligent shipowner would immunize him from liability for the full damages resulting from his negligence while exposing the non-shipowner to full liability no matter what the percentage of his fault. Yet Congress must have thought that, of all types of third parties, it is the shipowner who should be given the incentive to maintain safety on shipboard. In fact, the Committees said that "the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work" (p. 10). In other words Congress intended to subject all third parties to the same rules, whether sued under Section 5(b) or Section 33. This meant the same standard of care *and the same rule of full liability.* Otherwise shipboard safety might be compromised.

As previously indicated, suggestions were made at the hearings that shipowners should be entirely immune from suit (and subject to workmen's compensation liability), while negligence suits against other third parties would be preserved. *House Hearings* 87. The Committees rejected the suggestion and undertook to treat them all alike. *Senate Report* 8. It follows that if there is no apportionment under Section 33, there can be none under Section 5(b).

The decision of the Court of Appeals has already led to a situation in the Fourth Circuit which thwarts the purpose of the Amendments to guarantee the employer an "exclusive remedy" in return for higher benefits. The Court below said that "the stevedore might be made a party plaintiff" so that his lien rights could be adjudicated. A. 61. In other words, stevedores would be "subject to additional law suits," which is precisely what the Congress said should not be done. *Senate Report* 4.

Attorneys for shipowners in Baltimore and Norfolk have been filing motions to require the joinder of employers and their insurance carriers at the inception of the litigation. E.g. *James R. Butler v. Eucharis Shipping Corp.*, Civil Action No. 78-431-N in the Eastern District of Virginia, Norfolk Division; *Stanley M. Wetters v. Moore-McCormick Lines, Inc.*, Civil Action No. H-77-858 in the District of Maryland. In the latter case the District Judge entered an order summarily granting the motion, and the employer is now a party to "tripartite litigation" again despite all that Congress said in 1972. This exposes the fundamental error in the decision below.

V.

CONGRESS COULD NOT HAVE INTENDED TO LIMIT EMPLOYERS' LIEN RECOVERIES AS WELL AS BURDENING THEM WITH THE INCREASED COST OF COMPENSATION BENEFITS.

Respondent has argued that Congress intended to give employers an added financial inducement to promote safety by limiting their lien recoveries where their negligence contributed to injuries. This shows considerable ignorance of the cost of waterfront safety (or lack thereof) and workmen's compensation. The LHWCA itself furnishes all the financial incentive necessary to promote safety. It is the employer (and his carrier) who pay first and pay most, no matter who was negligent. Lien recoveries in third party suits are a

small factor in the equation. This has been particularly true under the 1972 Amendments because the Courts of Appeals have taken a very strict view of the negligence standard to be applied against a shipowner. The shipowner has been extremely successful in defending such suits, using the conservative language of the Reports as a defense.[11] Congress intended this result.

This is what the shipowner got out of the "trade-off" referred to by the Court below. A57a. He was given good defenses when he was not negligent, not a new limitation of liability when he was negligent. Congress simply had no reason to give the shipowner any other benefits even if he had asked for them, which, as we have noted above, he did not do.

When it came time in 1972 to add to the employer/carrier's financial burdens, Congress set Ossa upon Pelion. The brief of *amicus* National Association of Stevedores lists the increased benefits under the Amendments. Just as an example, the maximum weekly payment had theretofore been $70; it is now $396.78, with a built-in escalation for annual inflation increases.

During 1977 and 1978 the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor of the House of Representatives, 95th Cong., 1st Sess., has been conducting Oversight Hearings on the LHWCA. (Part 1 (953 pp.) has been printed, and Part 2 is expected shortly.) The waterfront industry covered by the LHWCA has been in a state of financial crisis as a result of the additional costs imposed by the 1972 Amendments[12] and the unavailability of insurance because the risks are largely uninsurable.[13]

[11] E.G. *Anderson v. Iceland Steamship Co.*, (1 Cir. 9/29/78) (not yet reported); *Munoz v. Flota Mercante Grancolombiana*, 553 F.2d 837 (2 Cir. 1977); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3 Cir. 1977); *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072 (4 Cir. 1978); *Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5 Cir. 1977); *Wescott v. Impresas Armadoras, S.A.*, 564 F.2d 875 (9 Cir. 1977).

[12] An insurance expert testified, for example, that the widow of a deceased employee, who might have died from causes unrelated to his injury, could receive death benefits of nearly $2,500,000 by age 77. *Oversight Hearings* 489.

Reference to these volumes, and to the two recent newspaper articles printed as an Appendix to this brief, will show two things. First, to the extent Congress intended to promote safety by increasing employers' financial burdens, it was overkill; there was no need to resort to any "credit" against lien recoveries to accomplish this purpose. Secondly, Congress is currently and actively surveying the operation of the 1972 Amendments and can be expected further to amend the Act if it believes that an apportionment formula should be added.

It is the position of this *amicus* that since Congress undertook to cover the whole field in 1927, and to cover the specific subject of the employer-shipowner relationship in 1972, the establishment of a proportionate fault rule is a matter for Congress to prescribe in clear language, if that is what it wants. The Fourth Circuit majority has impatiently re-written the statute as it saw fit. All other courts have deferred to Congress. We ask this Court to do likewise. We note in passing that the situation here is unlike that in *Reliable Transfer, supra.*, where Congress had failed to accept the opportunity to legislate in the field of collision liability.

[13] Various witnesses testified that the risk is now so unpredictable that insurance is "prohibitively expensive and in some cases unavailable". P. 492. One stevedore executive showed letters from 23 insurance companies refusing to quote on his primary coverage. Pp. 462-481.

CONCLUSION

This Court has had only one previous occasion to consider the 1972 Amendments. *Northeast Terminal Co., Inc. v. Caputo, supra* (actually a group of cases we call *Caputo*). Although the issues there were different, the Court's method of analyzing the statute is adaptable here. In *Caputo* the Fourth Circuit claimed to have found in the Committee Reports evidence that Congress intended to adopt the "point of rest" rule for jurisdictional coverage. All other Circuits disagreed. In the instant case the Fourth Circuit claims to have found evidence of the proportionate fault rule as between shipowner and employer. All other Circuits disagree. In *Caputo* this Court, in reversing the Fourth Circuit (see *Adkins v. I.T.O. Corporation of Baltimore,* 433 U.S. 904) used language appropriate here. It rejected:

> "A theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent * * *." 432 U.S. at 278.

The decision below should be reversed.

Respectfully submitted,

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